ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

83-6456

LARRY JOE JOHNSON, SR.,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

QUESTION I

WHETHER PETITIONER HAS JURISDICTION TO PRESENT THE CLAIM THAT THE FLORIDA SUPREME COURT UTILIZED A STANDARD OF REVIEW, IN AFFIRMING HIS DEATH SENTENCE, WHICH VIOLATED HIS CONSTITUTIONAL PROTECTIONS UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

QUESTION II

WHETHER THE IMPOSITION OF PETITIONER'S DEATH SENTENCE VIOLATES THE RULES OF Gardner v. Florida, 430 U.S. 349 (1977), IN THAT THE TRIAL COURT REFERRED TO HIS OWN COURTROOM OBSERVATIONS OF PETITIONER WHEN HE MADE SENTENCING FINDINGS.

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TABLE OF CITATIONS

OPINION BELOW

Petitioner's designation of the opinion below is correct and acceptable to respondent.

JURISDICTION

Petitioner's jurisdictional allegation is acceptable to respondent.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Respondent accepts the constitutional and statutory provisions involved as set forth on p. 1 in the petition for writ of certiorari.

STATEMENT OF THE CASE AND FACTS

Respondent accepts the statement of the case and facts as found in the petition for writ of certiorari on pp. 1-6.

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

The question posed by petitioner's Issue I was not raised or decided below.

REASONS FOR NOT GRANTING THE WRIT

ISSUE I

WHETHER PETITIONER HAS JURISDICTION TO PRESENT THE CLAIM THAT THE FLORIDA SUPREME COURT UTILIZED A STANDARD OF REVIEW, IN AFFIRMING HIS DEATH SENTENCE, WHICH VIOLATED HIS CONSTITUTIONAL PROTECTIONS UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Petitioner presents this Court with the claim that the Florida death penalty statute, which passed constitutional muster in Proffitt v. Florida, 428 U.S. 242 (1976), provides for the arbitrary and capricious imposition of the death penalty.

By an expansive reading of this Court's decision in Eddings v. Oklahoma, 455 U.S. 104 (1982), and Proffitt v. Florida, supra, petitioner alleges that the Florida Supreme Court is improperly delegating to the trial court, its duty to review the findings of aggravating or mitigating circumstances made in support of petitioner's death sentence.

Before the merits of petitioner's claim can be reached, it is necessary to point out that the allegation here presented has never been raised by petitioner in a Florida forum. The motion for rehearing, included as an appendix to the petition, does not contain the allegation found here. This Court has held in Webb v. Webb, 451 U.S. 493 (1981), that the failure to demonstrate that the federal question was presented to the reviewing state court, precludes review.

> . . . it is a long-settled rule that the jurisdiction of this court can arise only if the record as a whole shows either expressly or by clear implication that the federal claim was adequately presented in the state system. . . .

Id. at 496. See also Cardinale v. Louisiana, 394 U.S. 437 (1969). It is, therefore, clear that this Court is without jurisdiction to review this issue.

However, even if properly presented, this claim is without merit. The fatal distinction petitioner fails to draw is

between an improper failure to review a trial court's sentencing finding, and a reluctance to delve into questions of credibility and sufficiency on appeal. The Florida Supreme Court has often demonstrated its willingness to overturn a sentence which is based on an unsupported circumstance. See Cooper v. State, 336 So.2d 1133 (Fla. 1976).

In Hargrave v. State, 366 So.2d 1 (Fla. 1978), the Florida Supreme Court stated:

> We are mandated by Section 921.141(4), F.S. (1975), automatically to review not only the judgment of conviction, but also the sentence of death. As pointed out in Proffitt v. Florida, supra, the final review of sentence in this Court supplies the channeled discretion and deliberation necessary to avert the constitutional deficiencies condemned in Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972). However, this Court's role is not and should not be to cast aside that careful deliberation which the matter of sentence has already received by the jury and the trial judge, unless there has been a material departure by either of them from their proper functions prescribed by Section 921.141, Florida Statutes (1975), or unless it appears that in view of other decisions concerning imposition of the death penalty the punishment is too great. State v. Dixon, supra.

Id. at 4, 5.

Petitioner does not allege, nor could he, that the trial court refused to consider evidence in mitigation. In fact, the trial court's sentencing order quoted in Johnson v. State, 442 So.2d 185, 189, states:

> Taken as a whole, together with the court's own observations of the defendant during the trial, as well as his testimony in pretrial proceedings, this court concludes that there were no mental or psychological factors sufficiently significant to support a conclusion as to any mitigating circumstance.

Id. at 189. (Emphasis ours.) Eddings makes clear the distinction between failure to find sufficient evidence to support a mitigating circumstance, and the failure to consider evidence of a mitigating circumstance.

> . . . it is clear that the trial judge did not evaluate the evidence in mitigation and find it wanting as a matter of fact, rather he found as a matter of law he was unable even to consider the evidence.

Eddings, 455 U.S., at 113.

Therefore, it is clear that even if this Court were to entertain the allegation of error presented by petitioner, this Court must conclude that petitioner has failed to demonstrate that his constitutional rights have been abridged by the imposition of the death penalty below.

ISSUE II

WHETHER THE IMPOSITION OF PETITIONER'S DEATH SENTENCE VIOLATES THE RULES OF Gardner v. Florida, 430 U.S. 349 (1977), IN THAT THE TRIAL COURT REFERRED TO HIS OWN COURTROOM OBSERVATIONS OF PETITIONER WHEN HE MADE SENTENCING FINDINGS.

Petitioner's final allegation is that his constitutional rights were abridged when the following statement was made by the trial court in his sentencing order.

> Taken as a whole together with this court's own observations of the defendant during the trial, as well as his testimony in pretrial proceedings, this court concludes that there were no mental or psychological factors sufficiently significant to support a conclusion as to any mitigating circumstances.

(Tr-1135)

It is alleged that this was a violation of this Court's precedent in Gardner v. Florida, 430 U.S. 349 (1977), in that petitioner was not afforded the opportunity to rebut the possible inferences the trial court made from his in-court observations of petitioner. The Florida Supreme Court addressed this allegation in its opinion.

> Appellant argues that the trial court's use of personal observations without warning and without an opportunity for rebuttal violated his fundamental right of due process. Appellant compares this procedure to that of a trial judge's considering a presentence investigation report without the defendant's knowledge, which procedure was disapproved in Gardner v. Florida, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977). The analogy is not appropriate. Whereas a defendant may not know what information is contained in a presentence investigation report he must know how he is behaving in the courtroom. In this situation the judge is not relying on information that is not available to the defendant.

442 So.2d 185, 190 (Fla. 1983).

Therefore, the allegation that there was information obtained by the trial court unknown to the defendant, is meritless. To the extent that petitioner argues that these observations do not become a part of the record on appeal, it is important to note that the Florida Supreme Court expressly held that

without these observations there was sufficient evidence to support the trial court's findings.

This Court recently decided a case in which the trial court, in sentencing appellant to death, compared the heinous nature of the crime to the court's own experiences in World War II. Barclay v. Florida, ____U.S.____, 103 S.Ct. 3418 (1983). This Court stated:

> Any sentencing decision calls for the exercise of judgment. It is neither possible nor desirable for a person to whom the state entrusts an important judgment to decide in a vacuum as if he had no experiences.
>
> * * *
>
> It is entirely fitting for the moral, factual, and legal judgment of judges and juries to play a meaningful role in sentencing.

Id. at 3424.

Petitioner complains that allowing a trial court to make use of such observations allows an aggravation of sentence merely because the court "doesn't like the looks" of the defendant. This theory ignores the ongoing duty of the trial court under Florida Rule of Criminal Procedure 3.210(d), to observe a defendant for the possibility of incompetence to stand trial. Under Fla.R.Cr.P. 3.210, the trial court, on its own motion, may set a hearing for the determination of competence if there are reasonable grounds to believe that the defendant is incompetent to stand trial. By this criminal rule, the Florida Supreme Court acknowledged the ability of a trial court to make observations of a defendant's courtroom conduct. As the Florida Supreme Court stated in the opinion sub judice, "although justice should be blind, judges are not." 442 So.2d 185, at 190 (Fla. 1983).

Lastly, the Florida Supreme Court made the finding that the trial judge gave sufficient reasons, even without the personal observations, to support his conclusion that the death sentence was appropriate. This causes petitioner's allegation of constitutional infirmity to evaporate, since even without

the contested personal observations the death penalty is not arbitrarily or capriciously imposed. Such a state appellate finding is entitled to great weight. Wainwright v. Goode, _____U.S._____, 104 S.Ct. 378 (1983). This Court's review of petitioner's sentence is limited to the question of whether the imposition of that sentence is so unprincipled or arbitrary as to somehow violate the United States Constitution. Barclay, supra. It is therefore clear that under the above standard, petitioner has a heavy burden to demonstrate error of constitutional dimension. He has failed to make the requisite showing: this Court should refrain from granting the writ of certiorari.

CONCLUSION

For the above and foregoing reasons, petitioner's petition for writ of certiorari should be denied.

Respectfully submitted:

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CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of April, 1984, a copy of this Respondent's Brief in Opposition was mailed, postage prepaid, to Mr. Michael J. Minerva, Assistant Public Defender, Second Judicial Circuit, Post Office Box 671, Tallahassee, Florida 32302, Attorney for Petitioner. I further certify that all parties required to be served have been served.

Gregory C. Smith

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